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RELATIONSHIP
IN
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LAW

A Historical Perspective

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Part II

ORIGINS
The Scope of the Master-Servant Relationship under Mercantilist and Early Capitalist Legislation Designed to Forge and Discipline the Nascent Proletariat

The English ruling classes enacted a great volume of legislation overtly hostile to the working classes in the half-millennium between the Statutes of Labourers and the repeal of the Combination Laws in 1825. As the nineteenth-century British founder of marginal utility theory, Jevons, observed: "[L]egislation with regard to labour has almost always been class-legislation. It is the effort of some dominant body to keep down a lower class, which had begun to show inconvenient aspirations." In order to apply the coercion and mete out the punishment provided for in these statutory schemes, the courts were required to plot the perimeter encircling the intended class delinquents. In thus determining who was a servant or employee, judges created a framework of understandings that have endured to the present despite the vast transformations that economic society has undergone during the intervening centuries.

The principal classes of relevant statutory schemes are those that: (1) compelled entry into and punished unauthorized departures from labor service; (2) fixed wages and hours and punished deviations therefrom; (3) discouraged pauperism and regulated labor mobility; and (4) prohibited combinations by workers and punished certain conduct within the workshop.

I. THE STATUTES OF LABOURERS

The vast human destruction left in the wake of the Black Plague in 1348-49 so reduced the supply of labor
in England—thus making possible a significant rise in wages—as to curtail the incipient practices of commuting labor services in favor of money rents and cultivating demesnes by day or piece laborers. In order to interfere with these supply and demand forces in favor of employers, an Ordinance of Labourers was promulgated in 1349 and a Statute of Labourers enacted in 1351. As a set of coercive regulations designed to curb the insubordination of this new class of free laborers and its concomitant untoward impact on labor market conditions, "[i]t is to these laws, as developed by subsequent legislation, that we must look not only for the beginnings of the law as to master and servant, but also for the origins of" the Anglo-American juridical distinction between hired servants and independent contractors. As the typical product of a transition period, the master-servant relationship as shaped by the statute and common law was hybrid in character:

The legislators of the fourteenth century aimed at obtaining the same results as those attained by the old customs and by-laws. These old customs and by-laws treated the relationship of master and servant as a status, and regulated it accordingly. The legislators of the fourteenth century recognized that the relationship had then come to be created by contract. But the conditions which they prescribed for the formation of the contract, and the manner in which they defined the rights and duties of the parties to it, showed that they intended that the relationship should preserve some of the characteristics of a status.

The real-world difference between an independent contractor and a servant was reflected in the unique and extraordinary remedies available to a master in case of breach of contract:

[H]e could use force to capture a servant who departed, or who, having been retained, never entered his service. Further, he had...rights against other masters who persuaded his servant to depart, or who, having unknowingly engaged his servant, did not give him up when required to do so. Thus it would appear that the relation between master and servant under the statutes, though contractual in its origin and some of its incidents, gave rise, like the marriage
contract, to a status of a peculiar kind. The relationship was founded on contract, but the rights and duties involved in the relationship were fixed to a large extent by law and not by the agreement of the parties. The legislature intended that the results of contracts of employment with free labourers should reproduce such of the incidents of the status of villeinage as could be usefully adapted to the situation. It was felt...that the progress from status to contract could not be made at one bound.

The three basic principles of the Ordinance were compulsory service at pre-plague wages and criminalization of the failure to comply with these conditions. Specifically, it provided that every able-bodied person under sixty years old:

Having excluded from its scope those who were economically independent, the Ordinance imposed imprisonment for unreasonable premature departure from service on "any reaper, mower, or other workman or servant [aut alius operarius uel seruiens], of what estate or condition that he be, retained in any man's service," while "sadlers, skinners, white-tawers, cordoners, saylors, smiths, carpenters, masons, tilers, shipwrights, carters, and all other artificers and workmen" were subject to incarceration for taking excessive wages "for their labour and workmanship."

In order to overcome non-compliance with the Ordinance on the part of servants who "to their ease and singular covetise, do withdraw themselves to serve great men and other, unless they have...wages to the double or treble of that they were wont to take the said twentieth year...to the great damage of the great men, and impoverishing of all the said commonalty," A Statute of Labourers was passed in 1351 prescribing specific piece or time wages for mowers of meadows and reapers of corn, masters and other building tradesmen
"workmen of houses"), and maximum wages for threshing of wheat or rye. In addition to reaffirming the pre-plague wages for carters, ploughmen, shepherds, and "all other servants," and prohibiting them from serving by the day, the Statute required a whole array of artificers including goldsmiths, sadlers, horsesmiths, tanners, tailors, "and other workmen, artificers and labourers, and all other servants here not specified" to be sworn before the justices to use their crafts as in the said twentieth year of King Edward III's reign on pain of fine and imprisonment.

During the following two hundred years, until it was repealed by the Statute of Artificers, the Statutes of Labourers were repeatedly confirmed and amended. In 1388 the Statutes were amended to prohibit servants and laborers from leaving their locality at the end of their term of service without a letter patent and to compel to serve in the corn harvest "as well artificers and people of mystery, as servants and apprentices, which be of no great avoyr, and of which craft or mystery a man hath no great need in harvest time." A localizing innovation the next year provided:

That the justices of peace in every county...shall make proclamation by their discretion according to the dearth of victuals, how much every mason, carpenter, tiler, and other craftsmen, workmen, and other labourers by the day...shall take by the day with meat and drink, or without....

From this time forward the justices of the peace were increasingly integrated into the enforcement of the Statutes. Thus in 1423 they were authorized to imprison all manner of servants taking excessive wages. Four years later the Statutes of 1388 and 1389 were amended because they had not been enforced: the former "because...the punishment...is too hard upon the masters of such servants, forasmuch as they shall be destitute of servants, if they should not pass the ordinance of the statute"; and the latter "because...no pain is limited against him that doeth contrary to the same statute." The justices were therefore authorized to proclaim how much every servant in husbandry should take for his service by the year and every artificer and workman by the day. On servants, artificers, and workmen in violation of these provisions were imposed fines, imprisonment, and double damages to be paid to the aggrieved party. Toward the end of the fifteenth century and the beginning of the sixteenth century the statutes prescribed in addition to the wages of servants in husbandry and artificers and (day) laborers
the working hours of the last-named categories.

The transitional and hence contradictory nature of the Statutes of Labourers was reflected in the fact that although they clearly restricted the mobility of dependent labor, they also expanded the scope of workers' freedom by depriving the manorial lords of an exclusive right to their tenants' labor. Similarly, although the right to fix wages was taken from the individual lords and given to state officials, the justices of the peace were part of the landlord class. Consequently, "the legislature now united them into a kind of employer's association, which could set the price of labour untrammeled by local considerations." Virtually the sole targets of enforcement of the Statutes—with regard to the wage as well as the contract provisions—were "members of what are technically known as the labouring classes" including "practically every variety of economic class as far as manual labourers were concerned." Precisely how the courts distinguished between the dependent laborers subject to the wage and compulsory service provisions of the Statutes and the socioeconomically and politically independent occupations that were neither privileged nor discriminated against by them can be examined by reference to the cases reported in the year books from the reign of Edward III to the Tudors.

In the litigation arising under the Statutes of Labourers originated the intersection between statutory and common labor law on the one hand and the inchoate emergence of labor law out of contract law. Thus "before the growth of the action of assumpsit the common law had no action to enforce a simple executory contract. But, though an agreement by a workman to serve an employer was a contract, a parol retainer by an employer, which complied with the statutory requirements, was enforceable." This one exception to the general rule that informal covenants were not actionable at common law was the master's action for departure against his servant. Since the Ordinance and Statutes of Labourer were silent "about any action for damages," it has been speculated "that the action for departure came into the law as accessory to the action for retaining or harbouring a servant which lay against third parties, the servant himself being viewed as a joint wrongdoer." Precisely what types of employee could be sued in an action for departure provoked considerable argument." Although little controversy was generated at the extremes—common laborers in husbandry and persons performing non-manual services—identifying artisans subject to the Statutes and hence to the action as well proved troublesome. Since the scope of
the action was restricted by the threshold requirement of a showing of a retainer for a term,\textsuperscript{46} the action could not be used against what we would call an independent contractor, but only against a person taken on to the master's staff.\textsuperscript{47} Subsequently independent contractors became amenable to suit by virtue of the action of assumpsit for nonfeasance.\textsuperscript{48}

In the mid-fifteenth century the courts insisted that there must be a genuine agreement to enter into service, and not merely to perform particular work as the occasion demanded. It may be--there is no clear evidence--that this change in policy prevented the use of the statutory action against independent contractors, and thus encouraged the use of assumpsit to fill the gap. For unless assumpsit was allowed, the resulting state of the law would be anomalous, the independent contractor being protected by action of debt, whilst his employer was remediless.\textsuperscript{49}

At one of the occupational extremes,\textsuperscript{50} it was repeatedly and uniformly held that persons retained to celebrate divine services were not subject to the Statutes and hence compellable to serve because they were neither laborers nor servants "mes le servant de Dieu."\textsuperscript{51} The reason for this exclusion lay in the fact that like "un Cheval', Esquier, ou Gentilhome," a chaplain had something on which to live, whereas the Statute was directed against laborers, "who are vagrants and have nothing on which they live."\textsuperscript{52}

The first reported case (1374) against an artificer involved an embroiderer who was sued for departing within his half-year term. Since the statute spoke only of servants and laborers, the defendant requested judgment. But the court, without reported explanation, allowed the plaintiff to maintain the action.\textsuperscript{53} Numerous cases involved carpenters. In the first such case it was held that whereas an action lay against a common laborer under the Statute because he was obligated to perform all labor commanded of him, a master could proceed against a departing carpenter where he was a "true servant only in the office of carpenter...because when such an artificer was retained...to do what pertains to a carpenter, he was retained to do that which pertains to his art, and he is not held to do every manner of service, but the office of carpenter."\textsuperscript{54} The plaintiff then hastened to add that he had indeed so covenanted with him.\textsuperscript{55} But at the same term where an action was brought on the case
EARLY CAPITALIST LEGISLATION

for misfeasance against a carpenter who had covenanted to build a house within a certain time, the court stated that the plaintiff could have had an action under the Statute of Labourers if the carpenter had been retained in his service to build a house. Still later in a case involving a defendant-tallow chandler, who was held not compellable to serve in such an office because the Statute contemplated laborers in husbandry, the question was raised whether a man could compel a carpenter or tailor to serve him. Some replied in the negative on the ground that they could not be compelled to "use their occupation against their will."

The Statutes of Labourers and the common law, in summary, established the existence of a class of servants and laborers—that is, common, unskilled manual workers—categorically defined by reference to their lack of productive assets and hence penury and dependence. By casting them as at all times potential vagabonds in need of state-enforced discipline to ensure that they did not engage in recidivist (independent economic) behavior and thus seek to avoid conforming to the rigors of their new status as wage laborers, the state unambiguously branded them as a proletariat. Nevertheless, the statutory and case law does not appear to have succeeded in unambiguously segregating out the independent contractors from among the group of skilled artisans. The relatively scanty case law, while plausibly drawing the line at those who were retained in an office on the master's staff, was unable to substantiate—apart from the use of artificial forms relating to the term of service—this distinction.

II. THE STATUTE OF ARTIFICERS

The so-called Statute of Artificers of 1563, a coercive Tudor national compulsory service act, remained in force for 250 years. Although its many-layered legislative history is subject to controversy, the Statute of Artificers was clearly designed to regulate the national labor market by creating institutions and procedures to set wage rates locally, to shape the conditions of employment, and to channel labor mobility. Like the Statute of Labourers, which it "adapted to the needs of the sixteenth century," it comprehended everything touching on employment—and not merely wage earning in the strict and narrow sense. Such a broad coercive-regulatory regime served the purpose of accelerating the transformation of labor into a commodity by undermining the position of those
who had in the course of the fourteenth and fifteenth centuries escaped various forms of serfdom. With the advent of the enclosure movement in the fifteenth century cottagers began to lose their land and their rights to the use of the commons, thus becoming increasingly dependent on wages. By forcing these marginalized workers to accept employment at the wages fixed by the local justices, the "Statute of Artificers... accentuated the isolation of the poorest classes, since by it any man or woman without an agricultural holding could be condemned to semi-servile labour in industry or agriculture," thereby debasing the status of all wage laborers. The compulsion exerted by the Statute of Artificers was instrumental in bringing about the predominance of wage labor by the seventeenth century.

The Statute itself motivated the repeal of the Statute of Labourers and its amendments in part by reference to the circumstance that, in relation to "the advancement of prices of all things belonging to... servants and labourers," wages had become "too small"; consequently, the old "laws cannot conveniently, without the great grief and burden of the poor labourer and hired men, be put in good and due execution." In this context it is crucial to observe that at this time in English agriculture, "labourers" were wage workers hired by the day or week or on a result-oriented basis, whereas "servants," who were hired by the year, boarded with their masters and hence tended to be young and unmarried; paid largely in kind, they remained until they married and became laborers or cottagers.

Servants did not understand themselves, and were not understood by early modern society, to be part of a labouring class, youthful proletarians. Servants were not unfree simply because they had been reduced to the status of wage-takers. As members of the family, they were politically invisible.

In other words, as an intra-generational transitional category, such "servants" were neither born nor expected to die as servants.

The Statute of Artificers primarily regulated five aspects of the employment relationship: duration, compellability, mobility, wages and hours, and apprenticeship.

The Statute mandated a minimum one-year hiring for specified "sciences, crafts, mysteries or arts" including clothiers, weavers, hosiers, tailors, shoemakers, tanners, bakers, brewers, glovers, smiths,
sadlers, hatmakers, butchers, cooks, and millers. All unmarried persons or those under thirty brought up in these "arts" or having used them in the preceding three years were obligated to be retained "upon request made by any person using" that art or mystery. Exempt were those who were either not dependent on wage labor or were already employed in compellable employment; these categories included one who: had lands or rent worth 40s. annually; was "worth of his own goods the clear value of ten pounds"; was already retained in husbandry or one of the named arts or any other art or science; or had "a convenient farm, or other holding in tillage, whereupon he may employ his labour." Compellable to serve in husbandry by the year in the same shire were all between the age of twelve and sixty—with the same and additional exceptions.

Penalties were also imposed on the parties if they "put away" the servant or departed from their masters before the end of the term without sufficient cause or failed to give one quarter's notice—namely, the master forfeited 40s., while the servant was imprisoned until he returned to his master for the rated wages.

Geographic and occupational mobility was controlled by conditioning: departure from the locality on a testimonial from the authorities licensing the servant's liberty to serve elsewhere; and new hires on the showing of such a document. While offending masters were subject to a forfeiture of five pounds, servants in violation of this provision could be imprisoned or whipped as vagabonds.

Whereas the Statute established nationally uniform hours of work for all artificers and laborers paid daily or weekly wages, it delegated to the local justices of the peace, sheriffs, and mayors the "authority...to limit, rate and appoint the wages...of artificers, handicraftsmen, husbandmen or any other labourer, servant or workman whose wages in time past hath been by any law or statute rated and appointed...as also the wages of all other labourers, artificers, workmen or apprentices of husbandry, which have not been rated." Those who gave greater wages could be imprisoned for ten days and forfeit five pounds, while those who took more in wages could be imprisoned for twenty-one days.

Although these wage assessments by the justices achieved the goal of lowering wage earners' living standards, the Statute was amended fifty years later because "the rates of wages of poor artificers, labourers" and others had not been rated "according to the plenty, scarcity, necessity, and respect of the time" owing to an ambiguity as to whether the act applied to "all manner artificers, work-men and work-
women... other than such as by some statute and law have been rated, or else such as did work about husbandry." The justices were therefore authorized "to rate wages of any labourers, weavers, spinsters, and work-men or work-women whatsoever, either working by the day, week, month, year, or taking any work at any person or persons hand whatsoever, to be done in great or otherwise."

The scope of actions for wages under the Statute of Artificers was limited in four ways. First, justices were merely authorized--not required--to assess wages. Second, the Statute "gave no power to the magistrates to order a master to pay to the servant the wages which they had fixed. The master was liable to a penalty if he wrongfully dismissed his servant; but the servant could not, as a rule, get from the justices an order for payment." Third, in some instances the courts interpreted the Statute restrictively as conferring jurisdiction on the justices not "concerning the wages of servants, but only of such who are hired by the year, according to the statute, and who are hired in the service of husbandry." Therefore an order compelling an employer to pay a day laborer was quashed. Adverting to this case, the encyclopedist of English legal history, Holdsworth, wrote that it "ruled out most of the workmen who were employed by the capitalist manufacturer by the week or by the day." Although numerous cases bespeak this narrow view, there was also early case law laying down a more expansive interpretation creating a presumption of jurisdiction "upon general words, unless the contrary appear upon the face of the order":

Though the statute gives them [the justices] a power to set the rate for wages, and not to order payment; yet grafting hereupon, they have also taken upon them to order payment; and the courts of law are indulgent in remedies for wages, as appears by its suffering the Admiralty to have cognizance of mariners' wages; and therefore they would intend it such wages as were within the statute.

Holdsworth's view was in part shaped by the fourth limiting fact, which he regarded as a "curious" exception to the second limitation. In a late sixteenth-century case, Gomersall v. Watkinson, the Court of King's Bench held that, whereas one who was not compellable to serve must sue in a debt action, a woman retained in domestic service for five years, who
was compelled to serve under the Statute at a salary assessed by the justices of the peace, could sue for her wages on the Statute. At this point, according to Holdsworth:

It seems to have been deduced from this rule that, if a person could be compelled to serve in husbandry and so had a remedy under the statute, that remedy might take the form of an application to the magistrate for an order against his master to pay. In other words, in the case of labourers in husbandry, the magistrates could not only rate wages, but could make an order to pay them wages. This rule seems to have led to the wholly illogical conclusion, a conclusion which was quite contrary to the provisions of the Acts of Elizabeth and James I, that the magistrates could rate only the wages of persons employed in husbandry.

While contributing little if anything to the continuing elucidation of the distinction between servants and independent contractors, the Statute of Artificers, with its focus on compellability of service, strengthened the juridical view of manual laborers as a readily identifiable class apart of impoverished perpetual quasi outlaws. It thereby promoted a tradition upon which even free-marketeer Victorian judges would draw enabling them to know a proletarian when they saw one.

III. THE POOR LAWS

It is perhaps as surprising as it is disconcerting to the modern liberal consciousness that by far the most prolific source of litigational structuring of the outer limits of the employment relationship in the eighteenth and nineteenth centuries took place within the context of the coercive poor law system. A succession of mercantilist enactments designed to discourage pauperism and vagabondage and to regulate the internal flow of the potential working population, the poor laws accounted for an enormous volume and share of English litigation in the eighteenth century.

The first pertinent enactment, "An act for the better relief of the poor of this kingdom," was passed in the wake of the Restoration of 1660. Once again in power, the gentry "put an end to the mobility which had been an essential part of popular liberty in
the revolutionary decades. The Act of Settlement of 1662 recited that "for want of a due provision of the regulations of relief and employment in parishes" where the poor were settled:

Poor people are not restrained from going from one parish to another, and therefore do endeavour to settle themselves in those parishes where there is the best stock, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy, and when they have consumed it, then to another parish, and at last become rogues and vagabonds, to the great discouragement of the parishes to provide stocks, where it is liable to be devoured by strangers....

Parliament therefore authorized the justices of the peace, upon complaint made by the churchwardens or overseers of the poor of any parish, within forty days of settlement, to remove any such person coming to settle in any tenement under the yearly value of £10 to their parish of last legal settlement, "either as a native, householder, sojourner, apprentice or servant, for the space of forty days at least, unless...they give sufficient security for the discharge of the said parish...." This provision notwithstanding, the Act also permitted persons to go into other parishes in times of harvest "or at any time to work at any other work" provided they carried with them a certificate from their home parish that they had a dwelling house and had left wife and children there. Such persons could not gain a settlement in the new parish, and could be removed back to their original parish; if the poor law officials in the latter parish refused to receive them, they were subject to judicial contempt proceedings.

Once disafforestation, fen drainage, enclosure of commons, and capital investment in agriculture had created new demands for "a permanent class of landless wage labourers, however much this new status was felt as unfreedom," the rigidity of the system of labor control "could safely be modified." Thus in 1691 Parliament provided that "if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein." But in spite of this change, "the stringency of the law as to settlement seriously interfered with the mobility of labour, at the very time when the growth of the capitalistic organization of industry was making it more requisite than at any former time that labour
should be mobile." Therefore a new poor law was enacted a few years later in recognition of the fact that:

[M]any poor persons chargeable to the parish, township or place where they live, meerly for want of work, would in any other place where sufficient employment is to be had, maintain themselves and families, without being burthensome to any parish, township or place, but not being able to give such security as will or may be expected and required upon their coming to settle themselves in any other place...they are for the most part confined to live in their own parishes, townships or places, and not permitted to inhabit elsewhere, though their labour is wanted in many other places, where the increase of manufactures would employ more hands....

To remove this obstacle, the law provided that if an incoming person brought a certificate from another parish obliging it to receive and provide for him whenever he became chargeable, he could not be removed until he in fact became chargeable. Finally, in clarification of the provision for settlement by virtue of one year's service, the 1697 poor law enacted that "no such person so hired...shall be adjudged or deemed to have a good settlement in any such parish...unless such person shall continue and abide in the same service during the space of one whole year." In an attempt to avoid their obligations under the settlement and removal provisions parishes engaged in a wide variety of machinations. Within the huge volume of litigation between parishes spawned by state regulation of mobility a considerable number of cases dealt with the narrower issue of gaining settlement by virtue of hiring and service for a year. One of the favored modes of restrictive interpretation of the settlement laws was to argue that the hiring and service of the worker involved had not been for an entire year. To prop up this argument judges advanced the proposition that control was of necessity coextensive with service; thus if the worker could be shown not to have been continuously subject to his master's control, the settlement failed and removal was ordered. Thus where a thirteen year-old girl was hired to burl by a clothes worker but permitted to sleep at her aunt's every night and to live with her every Sunday, it was held that she had gained no settlement because "a hired servant is always under the
government, discipline, and control, of the master, even on Sundays." In denying a settlement to a glass grinder hired to work exclusively for the master for seven years, thirteen hours daily except Sundays, the chief justice of the King's Bench, Lord Kenyon, ruled "that it was essential in these cases that the servant should be under the power and coercion of the master during the whole time."

Though appropriate to agricultural laborers, domestic servants, and journeymen living in the master's house, such a doctrine "ruled out most of the workmen who were employed by the capitalist manufacturer by the week or by the day." As the organizational-locational effects of the Industrial Revolution proliferated toward the end of the eighteenth century and increasing numbers of poor persons sought to gain settlements by virtue of service in manufacturing, the courts were called upon to resolve the ensuing removal disputes. At first, judges did not appear inclined to depart from their rigid line of interpretation. Although counsel's argument was not germane to the facts of the case, the issue was presented in an ad absurdum argument as to why a hiring to serve twelve hours a day for five years had to give a settlement:

[O]therwise no settlement could be gained by a service in any of the different branches of manufactures, for in none of them is the servant under the control of the master during the whole year. Every hiring of a manufacturer necessarily excludes any service on Sundays, and leaves it in the power of the servant to determine what part of the other six days he will work for his master.

Unimpressed, the Court of King's Bench upheld its control doctrine as enunciated in Macclesfield.

But a breach appeared in 1818 in a case involving a pauper who had served as a clerk at £80 p.a. in a mercantile house, where he worked the customary office hours and did as he pleased Sundays. Confronted with the inflexible general rule, Lord Ellenborough, C.J., formulated a modern version:

There is in every contract of hiring some implied exception of hours for relaxation, food, and rest; I cannot at least suggest to myself any contract in which such exceptions do not exist. The master here has a right to the service of the pauper at all times, but he does not require his services...
at any other hours than those mentioned: there is not any exception in the contract. The hiring then being general, and there being no exception but such as are necessarily implied in every contract, I think that the pauper by serving under it for a year, gained a settlement....

In other words, although the King's Bench sustained the fiction that all masters theoretically retained the power to dispose of their servants' labor twenty-four hours a day throughout the duration of their service, where fewer hours were worked, so long as the hours corresponded -- and the parties did not contract for an express exception -- to "the custom of the particular trade," the settlement was gained.

In later cases the judges continued to take seriously as a demarcation line the master's control in the physical-juridical sense of being able to compel the worker-pauper to appear at work. Thus where a pauper worked for a buttoncaster from 6:00 a.m. to 7:00 p.m. but had the option of working overtime or not, the court held that no settlement had been gained because the pauper "had a right to say to his master, I have worked thirteen hours, and will not work more...limiting the control of the master to the specific period of time...." Conversely, where it was argued that the fact that the pauper agreed to obey a silk factory's regulations regarding the hours of attendance showed that she was not to be under the master's control at all hours, the court held:

In every contract of hiring, the law will imply that the party hired shall work at all reasonable hours when required. Generally speaking, the ordinary hours in a manufactory are twelve hours per day; but it does not therefore follow that the master may not on extraordinary occasions require his servants to work at other hours; and whether he does so or not, the relation of master and servant continues during the whole day. [I]nasmuch as the regulations might be and were, from time to time altered by the master, the stipulation that the servant should obey the rules and regulations of the factory with regard to hours of work did not give the servant the right to say that the master should not require her services at all reasonable hours.

Apart from the issue of control, the settlement
and removal cases did not directly address the issue of what constituted the master-servant relationship. One case decided by the Court of King's Bench in 1818, however, suggests that regardless of the factor of control, independent contractors may typically have been disabled from gaining a settlement by virtue of a yearly hiring and service. In that case a pauper entered into a contract to make 70,000 bricks on a piece rate basis between Michaelmas of 1809 and Michaelmas of 1810. The evidence indicated "that as soon as the pauper had made the 70,000 bricks according to his contract, his master had no controul over him, and he might go where he pleased, even if it was a month before Michaelmas..." Speaking through Lord Ellenborough, C.J., the court denied the settlement on the grounds that it was "only a contract for that individual job." Although this pauper was apparently not an independent contractor, the court's dictum to the effect that a hiring for a specific job to be done could never qualify as a yearly hiring irrespective of how long performance actually lasted suggests that independent contractors—who generally, though not categorically, are hired for specific work rather than for periods of time or at will—must have been severely disadvantaged in their efforts to gain a settlement on the basis of hiring and service unless they qualified through property ownership. Of tantalizing interest here is the fact that the issue of control, that is to say, real, concrete, workplace and production-process related control—as contradistinguished from the abstract power and authority of the master to dispose of his servant's time twenty-four hours a day, 365 days a year on which the settlement cases focused exclusively—over independent contractors such as to deprive them of the hiring and service necessary to gain a settlement seems never to have been litigated. Indeed, the law of settlement and removal was not even designed to distinguish between servants and independent contractors. Perhaps this accounts for why the Webbs included them in their indictment of the effects of the poor laws: "For more than 130 years the nine-tenths of the entire population who were manual-working wage-earners, or independent handicraftsmen, remained subject to this intolerable law." The conclusion of overriding significance to be drawn from the discussion of control within the poor law cases is that that notion of control was deeply rooted in pre-capitalist forms of compulsory service. Embedded in a network of laws and institutions designed to enforce behavior in conformity with a legal status creating a liability to serve, it had little or nothing
to do with the control exercised by a modern capitalist employing entity, which can supervise and direct to the most minute detail the activities of its subordinates within the factory, but is not entitled to use force—or to call upon the state to use force—to compel their appearance or to prevent their departure. The very fact that the capitalist employment relationship is driven by the economics of need and the class distribution of the ownership of the means of production and is simultaneously made opaque by the ideological form of wage labor means that the underlying control mechanisms must also take a different form from those prevailing in pre-capitalist formations.\textsuperscript{145}

The fusing of the two conceptions of the employment relationship and the control adequate to each can be traced back to the transition period to industrial capitalism in England.\textsuperscript{146} Of the representative legal thinker of the period, Blackstone,\textsuperscript{147} it has been said that the reason he viewed the relationship as one of status was not, or at least not principally, that in the social conditions of his day, the servant was often part of the familia. The reason was that, owing to the more than 400-year-old tradition of the Statutes of Labourers and Statutes of Artificers, and the more than 150-year-old tradition of the Poor Law, the law of master and servant was largely—in theory, though to a rapidly decreasing extent in practice—the law of those liable to be directed to work at wages fixed without their concurrence and liable to be punished for not accepting work on demand and for not doing it in accordance with the direction.\textsuperscript{148}

It was an advance beyond Blackstone when the American Zephaniah Swift, writing at the end of the eighteenth century, repeated the traditional definition of a servant as a person subjected to the power and authority of a master for a limited time, but excepted "[l]abourers, or persons hired by the days, week, or any longer time," because they were neither by law nor "in common speech considered as servants."\textsuperscript{149} Although the subsequent rhetorical reintegration—in the United States at least—of all grades of servants into one legal class subject to the master's personal authority,\textsuperscript{150} may have reflected a consciousness of the emergence of large-scale capital-labor relations as a new form of "social caste" "hostile to the genius of free institutions,"\textsuperscript{151} the use of the feudal-
mercantilist concept of control in concrete cases was predestined to define out of the employment relationship multifarious categories of manual workers who were clearly modern employees.

This ahistorical adoption by nineteenth- and twentieth-century American and English courts of an unexplicated control test in an effort to impose a restrictive definition on the working class and the rights it could vindicate was programmatically and almost belligerently articulated in the very first sentence of the first American treatise on labor law, which was so productive of numerous other doctrines detrimental to that class:

A servant, strictly speaking, is a person who, by contract or operation of law, is for a limited period subject to the authority or control of another person in a particular trade, business or occupation. It will serve no practical end to attempt to trace the rise, changes or improvements in this relation. ... It is enough for all practical purposes to know how the relation now exists, how it arises, what the relative rights and liabilities of the one to the other, and of either or both to third persons or the public are, at the present time, and to that end this treatise will be devoted.

IV. MASTER-SERVANT RELATIONS ACTS

The eighteenth century witnessed a proliferation of laws aimed at suppressing combinations of workers and imposing on the work force a discipline that nascent individualized capitalist accumulation had not yet succeeded in incorporating into the socio-organizational and technological structure of the workplace. Some of these explicitly targeted certain industries (especially the woolen and clothing trades); others were comprehensive in scope. Illustrative of the former class of special statutes were those: fixing the wages and hours of tailors and inflicting hard labor on the employed who departed from their service before the end of the term; imposing hard labor on journeymen shoemakers who worked for a second master before finishing the work for the first; imposing hard labor on weavers who departed or quit without reasonable cause, and seven years' transportation for assaulting a master woolcomber or weaver who had not complied with illegal rules or for writing letters threatening harm. A broader range of workers "hired,
retained or employed" to work up materials for any master in manufacturing (inter alia of hats, wool, linen, cotton, iron, leather, fur, and silk) also became subject to hard labor for refusing to work for eight days, working for another master at the same time, or being employed in any other occupation within eight days of completion of the work for the first master.\textsuperscript{159}

Whatever the practical coercive accomplishments of these enactments,\textsuperscript{160} it was the comprehensive statutory schemes that generated appellate litigation over the scope of the employment relationship. Chief among these lineal descendants of the Statutes of Labourers and Statute of Artificers was An Act for the better adjusting and more easy recovery of the wages of certain servants; and for the better regulation of such servants, and of certain apprentices.\textsuperscript{161} The Act set forth three different procedures for dealing with disputes between masters and servants. The first, relating to servants' wage claims, provided that:

all complaints, differences, and disputes...between masters and mistresses, and servants in husbandry, who shall be hired for one year, or longer,\textsuperscript{162} or... between masters and mistresses, and artificers, handicraftsmen, miners, colliers, keelmen, glassmen, potters, and other labourers employed for any certain time, or in any other manner, shall be determined by one or more justice or justices of the peace...although no rate or assessment of wages has been made that year by the justices of the peace...[who] are hereby impowered to examine...any such servant, artificer, handicraftsman...touching any such complaint...and to make such order for payment of so much wages as to such...justices shall seem just and reasonable, provided that the sum...do not exceed ten pounds with regard to any servant, nor five pounds with regard to any artificer, handicraftsman...; and in case of refusal or nonpayment of any sums so ordered, by the space of one and twenty days next after such determination, such...justices shall and may issue forth...their warrant to levy the same by distress and sale of the goods and chattels of such master or mistress, or person employing such artificer, handicraftsman....\textsuperscript{163}
Where, on the other hand, a master or employer applied or complained to the justices against any servant, etc., "touching or concerning any misdemeanor, miscarriage, or ill-behavior in...his...service or employment," the justices upon examination could punish the offender by sentencing him to up to one month's hard labor, or by abating some part of the wages or discharging the servant. And finally, where a servant complained about a master's or employer's "misusage, refusal or necessary provision, cruelty, or other ill-treatment," the justices were empowered merely to discharge the servant from the offender's service.

Two decades later, the justices of the peace were empowered to apprehend and commit to the house of correction for as long as three months any artificers, callicoe printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, laborers, and others, "who contract with Persons for certain Terms, do leave their respective Services before the Terms of their Contracts are fulfilled; to the great Disappointment and Loss of the Persons with whom they so contract...."

In 1823 these two enactments, still covering the same occupational groups, were amended to provide for up to three months' hard labor for failing to enter into the master's service after having signed a written contract, or--regardless of the existence of a written contract--absenting oneself from service or failing to fulfill the contract.

When the various combination laws were repealed in 1824 and 1825, an arbitration procedure was established, which could be mandatorily triggered by either masters or workmen where they would not abide by the determination of the justices of the peace, to resolve any disputes "between Masters and Workmen, or between Workmen and those employed by them, in any Trade or Manufacture," pertaining to wages, hours, performance, or quality of work. When virtually all of the aforementioned statutes were amended in 1867, the term "'employed'" was defined to "include any Servant, Workman, Artificer, Labourer, Apprentice, or other Person...who has entered into a Contract of Service with any Employer."

Obviously disparate class treatment--reflected in the fact that workers could be imprisoned for engaging in proscribed conduct, whereas the only consequence flowing from the master's unlawful conduct was a civil penalty--persisted until the enactment of the Employers and Workmen Act, 1875, which conferred jurisdiction on county courts over any dispute between the parties "arising out of or incidental to their
relation as such. It contained the following comprehensive and expansive definition:

The expression "workman" does not include a domestic servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, ... has entered into or works under a contract with an employer, whether the contract be...oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

A relatively small number of nineteenth-century appellate decisions became widely acknowledged as definitive landmarks construing the boundaries of the employment relationship under these statutes. In approaching these cases it is crucial to keep steadily visible the fact that since the statutes—unlike modern social-labor measures, under which employees never figure as defendants—conferred a right of action on both employers and employees against each other, coverage cut both ways. Thus, given the fact that few workers ever had the economic wherewithal to prosecute an appeal, and the further consequence that workers therefore appeared more often as appellees, they frequently had an incentive they would never have today to distort the real nature of the relationship by claiming that they were independent contractors in order to avoid being subject to the act. Thus narrow coverage favored the workers as defendants but undermined their wage claims as plaintiffs. Consequently, this class-neutral interpretive structure could result in pro-employer bias only if workers figured as plaintiffs more often than as defendants. Whether or not this was true at the J.P. level, in appeals they rarely did. In any event, the very fact that a liberal construction of the master-servant relationship could injure workers created a situation in which overlapping scopes of mischief and remedy did not coincide and were not infused with a humanitarian spirit. As a result, adjudications of the scope of the employment relationship in cases where workers were defendants lacked the the social-theoretical principled coherence made possible by modern protective legislative schemes.

In Lowther v. Earl of Radnor, a laborer had dug and lined with stones a well for the plaintiff—for whom he had previously worked as a servant in husbandry—on a per/foot basis; he was contractually
permitted to employ others. In response to the worker's successful complaint for back wages, the employer's goods were distrained. The employer then filed a trespass action against the magistrates. In interpreting 20 Geo. 2, c. 19, the Court of King's Bench rejected the employer's argument that the statutory term, "and other labourers," referred only to the enumerated trades, which did not include bricklaying or masonry.  Rather, the court held, since "[t]he mischief recited in the preamble of the Act" was "general," so was the relief—namely, "affording to certain servants and workmen, and to labourers in general, a speedy, easy, and cheap mode of recovering their wages when they amount to a small sum; and to masters an easy method of correcting trifling misdemeanors and ill behaviour in their workmen and labourers." 

This type of reasoning based on broad statutory policy also underlay the same court's decision in Branwell v. Penneck. There it held that a person employed by an attorney to keep possession of goods seized by the latter under a fieri facias (writ of execution) could not sue for payment of his services under 20 Geo. 2, c. 19 because he "was not that sort of labourer, nor the service rendered by him that sort of labour" intended by the Act. Rather, the Act implied coverage only of those laborers with respect to whom "the justices had power to make a rate of wages." But since that rate-making power, originating in the Statute of Artificers, "had principally in view outdoor work or country labour," it could manifestly not apply to one who did not engage in work or labor.

Use of this broad canonical criterion of manual labor—irrespective of the nature of the employment relationship between the parties—was obviously inadequate to the task of identifying the characteristics of covered manual labor. The rather narrow criterion which the Court of King's (and Queen's) Bench selected for this purpose was that of exclusivity. In two cases decided in 1829 under 4 Geo. 4., c. 34, the court ruled in favor of two workers who had been committed to jail for failure to complete their contracts. In adopting the silk weaver's arguments in Hardy v. Ryle, Bayley, J., in disregard of centuries of controversy over borderline cases, held that:

there is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be
said to have contracted to serve each of them. If that be so, the conviction and commitment are bad; for they do not shew that the plaintiff contracted to serve, but to weave certain goods. 187

But the mere fact that silk weaver contracted to work on a piece rate at his own house188 was hardly dispositive; for the control and exploitation—often rooted in indebtedness to the manufacturer—to which such outworkers were subjected even in the first part of the nineteenth century often made a mockery of their alleged independence based on an abstract right to work for many employers simultaneously. 189 Thus although this ruling contextually favored such outworkers as defendants in non-performance suits, it established a socioeconomically fallacious principle, which would come to haunt workers not only as plaintiffs under this act but under later protective legislation. That principle, as enunciated more explicitly in Lancaster v. Greaves, was that the requisite master-servant relationship presupposed exclusive service. 190

In strict adherence to Hardy and Lancaster, which it nevertheless viewed as having misinterpreted 4 Geo. 4, c. 34, the Court of Queen's Bench went so far as to hold that it was "impossible not to see that" a calico printer, working on a piece rate on the master's premises with the master's tools, had entered "into a contract to perform a particular work wholly distinct from entering into a 'service' in the ordinary sense of that term, as it is clear that the prisoner might perform that work according to his engagement, and yet be working at the same time for divers other persons." 191 Especially where piece work was "the universal practice of the trade," 192 an implied legal retention—unsubstantiated by evidence—of the right to work for others was meaningless; for this "right to choose for himself whom he would serve...constituted the main difference between a servant and a serf" 193 and as such cannot generate socioeconomically or juridically significant distinctions among workers.

Whether for purposes of accommodating judicial construction of the master-servant relations acts or for other reasons, employers became more sophisticated at manipulating contractual forms. By contracting for exclusive service, they could ensure that their workers would be subject to these punitive regimes in case they left their service before expiration of the notice period 195 or completion of the task, irrespective of the length of service or mode of compensation.

In the normal course of events, meeting the criterion of exclusivity would have been superfluous
where the workers were clearly attached to the employer's specialized physical capital. But in an oblique fashion—one to which the judges never alluded—the criterion did constitute a type of employment test grounded in specific class neediness and lack of access to the means of production. This connection was revealed inadvertently by a miner's counsel in support of his disclaimer that he had entered into a contract of service at all:

the prisoner was at liberty to work or not as he pleased; all that is agreed on is that, if the prisoner...cut coal, much or little, he is to be paid a price for it.... [It is thought that the obligation not to work for any one else will be a sufficient inducement to make them work.]

In other words, in an effort to prevent piece-rate workers with some marketable skills and a degree of self-supervision from engaging in soldiering by virtue of by-employment elsewhere, employers insisted on exclusivity provisions. But by thus curtailing their employees' freedom to contract, employers also ensured that strikers would be subject to the full force of the law.

APPENDIX A: CRIMINAL EMBEZZLEMENT STATUTES

The earliest criminal embezzlement legislation appears to have been enacted in 1530 under the title, "Servants imbezzling their masters goods to the value of forty shillings, or above, shall be punished as felons." Several statutes were enacted to favor employers in certain specified trades in which journeymen were alleged to have been stealing materials and finished products. The imperfect entrepreneurial, organizational, and technological integration and supervision associated with the putting-out system both impelled and enabled workers to combat non-point-of-production-rooted exploitation by embezzlement of raw materials and finished products. Employers, in turn, were empowered to engage in self-help in the pursuit of embezzlers of materials by entering the shop or outhouse of any person employed by them to work up materials or any other place where such work was carried on in order to inspect the state and condition of the materials. This provision—together with criminal penalties for failure to return worked-up materials within the contractually stipulated periods as well as for absence from work—was retained
Even before the rise of factories and the attendant supervision eliminated embezzlement as a form of countervailing power, the definition of employed persons does not appear to have been litigated in the reported cases.

In addition to these special statutes, general criminal statutes protecting masters against embezzlement by their "clerks or servants" were enacted in which a finding of the existence of an employment relationship functioned as a threshold issue to conviction. A number of relevant decisions issued under the latter statute, chiefly dealing with cattle drovers. In *R. v. Hughes*, a farmer occasionally employed the prisoner, to whom he testified that he was not in his service, to drive some cattle to the buyer and to return with the money. Without explanation, the court upheld the conviction on the grounds that the drover "was a servant within the meaning of the Act." But where the grazier testified that the drover was at liberty to drive cattle for others as well on the same trip, it was held that there was no proof that the accused was the grazier's servant, especially since "a man cannot be the servant of several persons at the same time, but is rather in the character of an agent."

This overriding criterion of lack of exclusivity—which must be regarded as a surrogate for being engaged in an independent or distinct trade—also figured prominently in the closely related issue of common-law larceny. In that context it was held, based on the vicarious liability cases of *Quarman v. Burnett* and *Milligan v. Wedge*, that, in spite of having his expenses paid and being compensated by the day, the accused drover was not a servant because he was at liberty to drive other persons' cattle. Consequently, being a bailee and not having had the requisite intent to appropriate the pigs to his own use at the time of receipt, the drover was not guilty of larceny. Lack of exclusivity as the dispositive factor in embezzlement was elaborated into the notion of a common carrier as applied to one who was employed "only" to carry unfinished gloves from manufacturers in one town to female sewers in another and finished ones from the women back to the manufacturers. He was also entrusted with the workers' compensation, from which he deducted his carrying charge. Since the manufacturers allegedly did not know the women—except by number—they held him responsible for missing work. When two of the workers prosecuted the carrier for embezzlement of their compensation, the court, relying on *R. v. Hey*, held that he was not their servant, but merely their bailee and hence the non-delivery merely a breach of trust.
Although the posture of the prosecution may have been a function of the state of English criminal law at the time, the question arises as to why both the sewers and the carrier were not considered employees of the manufacturers, who would still have been liable for the wages and could have prosecuted their carrier-employee for embezzlement for reimbursement.

Only after passage of the Larceny Act—and then in cases involving commissioned agents who handled money on behalf of their employers—did the courts adopt the control test. In the United States, on the other hand, the test of a servant for the purposes of state embezzlement laws was subjection to immediate direction and control.

APPENDIX B: THE COMMON-LAW ACTION OF ENTICEMENT

The paucity of reported common-law (employer-employee) cases litigating the scope of the employment relationship even as late as the nineteenth century is a peculiarity of capital-labor relations worth reflecting on. Apart from the obvious barrier to judicial access caused by the workers' poverty, the most important obstacle to litigation was the fact that the working class had not succeeded in creating many common-law rights that it could expect courts to vindicate:

Exploited workers are not plaintiffs in courts of law—until the days of legal aid they had no access to the courts—nor are they defendants—they are not worth the powder and shot. The remedies through which their obligations were enforced were not those of the law of contract; if it was done through law at all it was, until well into the second half of the nineteenth century, done through the poor law or the criminal law.

The most important class of early common-law actions between employers and employees defining the employment relationship was that of enticement, which originally arose out of the Statute of Labourers. Because a finding of independent contracting exculpated the worker (and the enticing employer), a broad definition of "servant" favored plaintiff-employers, for whose benefit the action was patently created. The long-standing precedent which guided the law during much of the nineteenth century was Lord Mansfield's opinion in Hart v. Aldridge.
plaintiff sued an enticer for trespass on the case for enticing away several of his servants who had worked for him as journeymen shoemakers. Working by the piece, they had had one pair of shoes unfinished at the time they departed. The defendant argued that the shoemakers could not have been the plaintiff's servants because the term "journeyman" did not import that they belonged to any particular master. Lord Mansfield held that: "A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece." The temporal exclusivity of the arrangement became dispositive:

For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not the journeyman of any particular master: but the gist of the present action is, that they were attached to this particular master.

The holding, redolent of feudal bonds, is difficult to interpret insofar as it did not deem it necessary to deal with the other characteristics of the relationship between the employer and the employees. If, as the case seems to suggest, the former was a master shoemaker, then the employment relationship was rooted in the complex of factors involving skill, integration, and control. But this backward-looking case manifestly had in view a penal form of control, which presumably would cease to be viable once the Great Transformation created free labor.

Yet so the law stood until 1853, when the Queen's Bench decided what became a chestnut of first-year contract classes, Lumley v. Gye. The plaintiff in the case, the lessee of Her Majesty's Theater, who had engaged Johanna Wagner, cantatrice of the Court of His Majesty the King of Prussia, for three months, sued the lessee of Covent Garden Theater for having maliciously enticed Wagner to depart from her employment with Lumley before completing performance of her contract. The defendant, who pleaded that the plaintiff's remedy was an action for breach of contract against Wagner, argued that "[t]he relation of master and servant is peculiar," originating as it does in contract between the two and yet giving rise to an action against a third party for enticement:

But these are anomalies, having their origin in times when slavery existed: they are intelligible on the supposition that the servant is the property of his master: and, though they have been continued long after
all but free service has ceased, they are still confined to cases where the relation of master and servant, in the strict sense, exists. In the present case Wagner is a dramatic artiste, not a servant in any sense.\textsuperscript{227}

The Court of Queen's Bench both squarely rejected this argument and expanded Lord Mansfield's ruling:

The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy...may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act; more especially when the party is bound to give such personal services exclusively to the master; though I by no means say that the service need be exclusive.\textsuperscript{228}

In response to the defendant's further claim that an action for enticement was limited to the menial servants and others to whom the Statute of Labourers applied, Wightman, J., stated that the common law provided for the right to maintain the action in connection with any contract for personal services for a time. The Statute of Labourers had merely added a remedy in cases where persons within the Statute voluntarily left their employment and were retained by another who knew of the previous employment.\textsuperscript{229} Referring to \textit{Hart v. Aldridge}, Wightman, J., rhetorically asked whether it could make any real difference whether the enticee was employed to make shoes or as a dramatic artist to sing songs: for "it is the exclusive personal service that gives the right."\textsuperscript{230}

In a lengthy and learned dissenting opinion Coleridge, J., sought to demonstrate that enticement actions did not antedate the Statute of Labourers although the want of such a remedy had been felt.\textsuperscript{231} Prior to the Statute an action at common law lay only against the servant for leaving service; under the Statute an action lay against the enticer but only if the enticed servant had been under compulsion to serve.
the first master. Since it was undisputed\textsuperscript{232} that such statutory compulsion applied only to "labourers, handicraftsmen, and people of low degree who had no means of their own to live upon, and who, if they did not live by wages earned by their labour, would be vagrants, mendicants or worse," "Johanna Wagner could not have been compelled, while the statute was unrepealed, to serve the plaintiff...."\textsuperscript{233}

Although at £100 weekly,\textsuperscript{234} Wagner was earning more in a week than a contemporary British laborer in a year,\textsuperscript{235} she still lived by her labor and not from capital or land. And while Wightman, J., surely missed the point that a shoemaker was subject to the kind of control to which a theater presumably could never subject an internationally sought-after opera singer, this point was also irrelevant to him, since he was prepared to detach the action from the employment relationship altogether.

Assuming \textit{arguendo} that the dissent was historically correct in confining the action of enticement to those subject to the Statute of Labourers, there can be no doubt that the latter set forth an unambiguous economic reality of class poverty and class dependence test of employment. But its origins in an oppressive regime of state-enforced unfree labor made it unpalatable as a source of authority to contractarian mid-Victorian judges for whom it was true as it ever has been for any judges that: "It is necessary for the law to see relations of subordination in terms of co-ordination, that is an act of submission in the mask of a 'contract,' because this is the fiction through which it exorcises the incubus of 'compulsory labour.'"\textsuperscript{236}

Consequently, courts sought a more appropriately modern basis for the action. Exclusivity of service was the logical choice inasmuch as it focused on the underlying injury; for if the service was not exclusive to begin with, the master would have had no reason to complain when the worker worked elsewhere (as well).\textsuperscript{237} But this sort of exclusivity not only had little to do with the essence of the employment relationship--it contradicted the whole thrust of the underlying principle of capitalist wage labor: formally free mobility. It was, therefore, consistent for Judge Crompton to suggest in dictum that the action was imaginable outside the master-servant relationship altogether.\textsuperscript{238}

Although within certain segments along a time continuum exclusivity might under certain circumstances constitute one criterion by which to distinguish employees from independent contractors,\textsuperscript{239} it would almost never be the dispositive factor. Nor did the
Lumley court ever intend it to function as such a differentia specifica. For the court did not deem that exercise in line drawing a threshold issue to coverage. Thus if this famous case was historically the entry point for the factor of exclusivity into the modern employment test, the logical basis for it is still lacking.

NOTES

1. On the other hand existed regulations in favour of the master, and against the workmen collectively, who in the aggregate and acting in combination were deemed stronger than their masters, and likely to oppress, not only their employers, but individuals of their own body. These were the laws against combinations and strikes.


5. "Quia magna pars populi & maxime operariorum & serventium nuper in pestilentia moriebatur, nonnulli videntem necessitatem dominorum & paucitatem serventium, servire noluerunt, nisi salaria recipiunt excessiva...." Statute of Labourers, 23 Edw. 3 (1349) (preamble). That the causality cannot be reduced merely to biological or demographic factors, but was rooted in a complicated matrix of socioeconomic class


9. 2 Holdsworth, History of English Law at 460.


11. 2 Holdsworth, History of English Law at 461.

12. Id. at 462-63.

13. A "petit damosel" below the age of ten was deemed unable to make a covenant and hence not to be retained. Y.B. Pasch. 2 Hen. 4, f. 18, pl. 7 (1400).

14."[N]on viuens de mercatura, nec certum exercens artificium, nec habens de suo proprio vnde viuere vel terram propriam circa culturam cuius se poterit occupare, et alteri non seruiens...." 23 Edw. 3, c. 1 (1349). On what constituted already being in service-
in particular—whether a request to serve for a year defeated service by the day, see Y.B. Mich. 11 Hen. 6, f. 1, pl. 2 (1433); Y.B. Trin. 11 Hen. 6, f. 52, pl. 19 (1433). On whether husbandry was an art, see Y.B. Trin. 18 Hen. 6, f. 13, pl. 2 (1440).

15. This principle remained in effect in the middle of the fifteenth century: "[T]hat by colour of the tenor of less land than the husbandry of the same shall suffice to the continual occupation of one man, no man shall be excused to serve by the year, upon the pain to be justified as a vagabond." 23 Hen. 6, c. 13 (1444). For an example of the quantitative limits of acreage and income beyond which service was not compellable, see Y.B. Mich. 40 Edw. 3, f. 39, pi. 16 (1367). For a view of the Statute of Labourers as directed against all "small men," including craftsmen and urban small dealers, see 1 Cambridge Economic History of Europe 516 (M. Postan ed. 1942).

16. Since making the covenant constituted being retained in service, failure or refusing to enter into service (and entering into service with another) constituted departure from service. Y.B. Mich. 41 Edw. 3, f. 20, pl. 4 (1368). Whereas at common law prior to the Statute a master would have an action of trespass if someone took his servant out of his service if he was corporally in his service, "the statute was made for this mischief, that if he never came into my service after he had made a covenant to serve me, and he absented himself from me, I shall have such a writ." Y.B. Mich. 47 Edw. 3, f. 14, pl. 15 (1372).

17. 23 Edw. 3, c. 2.

18. 23 Edw. 3, c. 5.


20. 25 Edw. 3, stat. 1, c. 1.

21. 25 Edw. 3, stat. 1, c. 3.

22. 25 Edw. 3, stat. 1, c. 2.

23. 25 Edw. 3, stat. 1, c. 1. "Many labourers would reject the respectable status of a ploughman, a carter, or a shepherd employed at a yearly wage, for that of a common labourer working by the day, in view of the fact that by such casual labour they could earn far larger sums and yet work entirely where and when they pleased." Ritchie, "Labour Conditions in Essex in the Reign of Richard II," 2 Essays in Economic History 91, 93 (E.M. Carus-Wilson ed. 1966 [1962]) (1st pub. in 4 Econ. Hist. Rev. 4 [1934]).
24. 25 Edw. 3, st. 1, c. 4. Imprisonment was also imposed for any other violations of the Statute. 25 Edw. 3, stat. 1, c. 5. On the public disposition of such fines, see 25 Edw. 3, st. 7 (1350) and 31 Edw. 3, st. 1, c. 6 (1357).

25. See, e.g., 34 Edw. 3, cc. 9-11 (1360) (requiring carpenters and masons to take wages by the day and prohibiting their alliances, prohibiting laborers, servants, and artificers from taking wages on festival days, and causing the letter "F" [for "falsity"] to be burnt in the forehead of laborers and artificers who absented themselves from service in another county); 42 Edw. 3, c. 6 (1368) (Statute shall be executed); 2 Rich. 2, st. 1, c. 8 (1378) (confirming); 4 Hen. 4, c. 14 (1402) (forbidding laborers to be retained to work by the week and fining any building workers who took any hire for holy days or eves of feasts, but only for the half day, unless they worked until noon).

26. 12 Rich. 2, c. 3 (1388). In a renewed effort to combat "outragious and excessive" wage demands that prevented husbands and land tenants from paying their rents, the new statute prescribed another scale of wages. While fining both takers and givers of such wages, it provided for imprisonment of judgment-proof takers. 12 Rich. 2, c. 4 (1388). It also compelled any person who performed labor or service in husbandry until the age of twelve to remain there. 12 Rich. 2, c. 5 (1388). By 7 Hen. 4, c. 17 (1406), only those with at least twenty shillings in land or rent were permitted to apprentice their children.

27. 13 Rich. 2, c. 8 (1389).

28. 2 Hen. 6, [no c. number but inserted between c. 14 and c. 15] (1423).

29. 6 Hen. 6, c. 3 (1427).

30. Id. This statute was confirmed by 8 Hen. 6, c. 8 (1429).

31. 11 Hen. 7, c. 22 (1494).

32. 6 Hen. 8, c. 3 (1514).

33. A subsequent impediment to free mobility required servants in husbandry to give their masters half a year's warning, failure to do which resulted in the compulsion to serve another year. 23 Hen. 6, c. 13 (1444).

34. Thus, for example, it was enacted "that justices of peace shall have power to take all servants retained with any person by colour of husbandry, and not duly occupied about the same, and to compel them to serve in
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the occupation of husbandry to such as shall require their service...." 23 Hen. 6, c. 13 (1444).


37. Where compellable to serve, a common laborer servant could sue his master in an action for debt on the Statute. See e.g., Y.B. Pasch. 4 Hen. 6, f. 19, pl. 5 (1426); Y.B. Trin. 11 Hen. 6, f. 48, pl. 5 (1433).


39. Id. at 81.

40. Whereas the courts of King's Bench and Common Pleas had jurisdiction over legal questions arising out of the master-servant relationship, enforcement of the Statute's wage clauses—which proceedings were criminal—devolved upon the justices of the peace. See Jones, "Per Quod Servitium Amisit," 74 Law Q. Rev. 39, 40-41 (1958).


42. 2 William Holdsworth, A History of English Law 462 (4th ed. 1936 [1909]). These requirements included, in addition to a retainer for a year or six months, wages and hours. Id.

43. A.W. Simpson, A History of the Common Law of Contract 48 (1975). Whereas before the Statute an action of trespass lay at common law against one taking a servant out of another's service, no action lay against the servant. It was for the latter "mischiefe" that the Statute was ordained. Y.B. Mich. 11 Hen. 4, f. 23, 24, pl. 46 (1410).


45. Simpson argues that "so long as a master retained a servant in his service, whether to perform skilled work which was the business of artificers or to perform unskilled work, he had an action against the servant
for departure from service." Id. at 261-62. The expression "which was the business of artificers" is misleading insofar as "business" can be understood to mean "business entity"; for, if the artificer had a "business"—building furniture, for example—then in order to be retained in the service of a master he would in effect have been forced to abandon his business. In other words, the exclusivity of service would have automatically converted him into a servant. If it was empirically the custom for certain artificers to work exclusively for one master for an extended period—although the requirement of a year's term to some extent obviated this problem—it would be difficult to classify them as independent. Rather, they were more plausibly bespoke workers employed seriatim on their employers' premises ("Kundenlohnwerker" in the typology set forth supra ch. 1).

46. Where a defendant-servant pleaded that he had made a covenant with the plaintiff to serve him six weeks on the condition that if he liked it he would serve a whole year, and if not, he could depart, the court ruled that if a master requested one to serve him and the latter covenanted to serve him, he entered into service unconditionally to serve for a year. Y.B. Hil. 11 Hen. 4, f. 43, 44, pl. 15 (1410).


48. "[I]f one make a covenant to build me a house by such a day, and he does nothing of it, I shall have action on my case on this nonfeasance as well as if he had misfeas'd this." Y.B. Mich. 21 Hen. 7, f. 41, pl. 66 (1498).


50. Although to the medieval lawyer the generic term "serviens" might include a bailiff or steward, there appears to be no evidence of any actions for the loss of services of such a "superior servant." See Jones, "Per Quod Servitium Amisit," 74 Law Q. Rev. 39, 54, 57 (1958).

51. Y.B. Trin. 50 Edw. 3, f. 13, pl. 3 (1375). See also Y.B. Pasch. 46 Edw. 3, f. 14, pl. 19 (1371); Y.B. Trin. 11 Hen. 6, f. 48, pl. 5 (1433) (action for debt by priest against executor); Y.B. Mich. 39 Hen. 6, f. 19, pl. 24 (1461) (priests, gentlemen, yeomen, butlers, cooks not constrainable to serve). But see Roden Hilton, Bondmen Made Free: Medieval Peasant Movements and the English Rising of 1381, at 129 (1982 [1973])
(undocumented assertion that clergy, like other wage earners, were subject to the Statute of Labourers).

52. Y.B. 10 Hen. 6, f. 8, pl. 30 (1432). Where a person who was not compellable to serve or was retained in a service in which he could not be compelled to serve brought an action for debt for his salary against the master, the latter could wage his law. *Gomersall v. Watkinson*, Moo. 698, 72 Eng. Rep. 848 (K.B. 1598). Thus, if a gentleman, yeoman, or an artisan were retained in his own office, he could not prevail against his master. But if he were retained in the office of husbandry, he could prevail. Y.B. Hil. 38 Hen. 6, f. 22, pl. 4 (1460); Y.B. Mich. 38 Hen. 6, f. 13, pl. 30 (1460). *See also* Y.B. Pasch. 4 Hen. 6, f. 19, pl. 5 (1426) (action for debt by one who made covenant with testator to be with him for a year in the art of lymm [spinning?] quashed). By contrast:

[A] Gentleman by his Covenant shall be bound to serve, although he were not compellable to serve. For if a Gentleman, or Chaplain, or Carpenter, or such which shall not be compelled to serve, etc. yet if they covenant to serve, they shall be bound by their Covenant, and an Action will lie against them for departing from their Service.

Anthony Fitz-Herbert, *The New Natura Brevium* 168 E (Lord Hale, C.J. ed. 1755 [1534]) (citations omitted). Thus if a carpenter or tailor or other servants or artificers were retained and left their service within the term, "their Master will have an action against them for departure from their service on the Statute, because the second article of the Statute for departure is general for all servants retained." Y.B. Mich. 38 Hen. 6, f. 13, pl. 30 (1460).

53. Y.B. Mich. 47 Edw. 3, f. 22, pl. 53 (1374). Apparently the court was not swayed by the defendant's statement that he was retained by the day by mutual agreement.


55. Id.

56. Y.B. 11 Hen. 4, f. 33, pl. 60 (1410). But, the court ruled, "cest action est trop feble."

57. Y.B. Hil. 8 Edw. 4, f. 23, pl. 1 (1469).
58. Although the subsequent rise of the action of assumpsit for nonfeasance may have practically solved the problem by virtue of being applicable only to financially solvent businessmen.

59. 5 Eliz., c. 4 (1563). Its proper title was: An act containing divers orders for artificers, labourers, servants of husbandry and apprentices.

60. See S. Bindoff, Tudor England 200 (1985 [1950]). In the opinion of the economist W. Stanley Jevons, the Statute of Artificers was "a monstrous law. From beginning to end it aimed at industrial slavery." It was simply a futile attempt to prevent labour from getting its proper price." W. Stanley Jevons, The State in Relation to Labour 34, 33-34 (1882).

61. Its wage-fixing provisions were repealed by 53 Geo. 3, c. 40 (1813); and its apprenticeship provisions by 54 Geo 3, c. 96 (1814); the Conspiracy and Protection of Property Act, 38 & 39 Vict., ch. 38, § 17 (1875), repealed the remainder. Although its vitality during that period was progressively undermined by the advance of capitalism, Unwin argued that the Statute, backward looking ab ovo, could not restrain the new societal forces. George Unwin, Industrial Organization in the Sixteenth and Seventeenth Centuries 137-41 (1957 [1904]). On the repeal of the apprenticeship provisions, see I.J. Prothero, Artisans and Politics in Early Nineteenth-Century London 51-61 (1979).  


64. Previously the Tudor regime had established punishment for "artificers, handicraftsmen and labourers" engaging in "conspiracies" to regulate their wages, hours, and output ranging from monetary forfeitures to pillorying and mutilation. The bill of conspiracies of victuallers and craftsmen, 2 & 3 Edw., c. 15, §§1 (1548).

Whereas Parliament in 1548 prohibited interference with building workers whom any person would "retain" in places where they did not dwell, this statutorily granted freedom of movement was repealed the next year. The bill of conspiracies of victuallers and craftsmen, 2 & 3 Edw. 6, c. 15, § 4 (1548), repealed by An act touching the repeal of a certain branch of an act passed in the last session of this parliament, concerning victuallers and artificers, 3 & 4 Edw. 6, c. 20 (1549).

67. 4 William Holdsworth, A History of English Law 380 (3d ed. 1945 [1924]).

68. See Joyce Youings, Sixteenth Century England 291 (1986 [1984]).

69. As a society in transition between social formations, Tudor England was both status riven and class driven. The status of laborers was, for example, regulated by sumptuary laws proscribing the wearing of certain kinds of clothing, as well as by their statutory exemption from tithes. An Act against wearing of costly Apparrell, 1 Hen. 8, c. 14 (1509); An act for payment of tithes, 2 & 3 Edw. 6, c. 13, § 7 (1548).


71. See 1 Karl Marx, Das Kapital ch. 27-28 (1867).


practicable precisely because so few were entirely dependent on wages.

75. 5 Eliz., c. 4, § II.

76. 5 Eliz., c. 4, § [I].


80. In the seventeenth century, "servants" also had a second meaning including all wage laborers. See id. at 6, 135-42; C.B. Macpherson, The Political Theory of Possessive Individualism 283 (1979 [1962]).


82. Although the apprentice restrictions were very influential, they are not relevant in the present context. See 5 Eliz., c. 4, §§ XXV-XXXVI, XLII.

83. 5 Eliz., c. 4, § III.

84. Id. § IV.

85. Id. § VII. The penalty provided in § XIX applied to refusals to serve. In addition, the justices could compel artificers to serve in husbandry at harvest time (§ XXII), and unmarried women between the age of twelve and forty in any reasonable service (§ XXIV). Refusal by the former to serve could result in two days' imprisonment, by the latter "until she shall be bounden to serve." These provisions repealed 4 & 5 Edw. 6, c. 22 (1552), which prohibited enumerated artisans from employing journeymen for less than a quarter-year, and required servants in husbandry to "serve by the whole year, and not by day-wages."

86. 5 Eliz., c.4, §§ V-IX. One month's imprisonment was provided for failure to complete piece work; id. § XIII. For an assault on a master, a servant, workman, or laborer could be imprisoned for one year. Id. § XXI.

87. Id. §§ X-XI. Servants who departed from their masters were returnable. Id. § XLVII. An act touching the punishment of vagabonds and other idle persons, 3 & 4 Edw. 6, c. 16 (1549), provided that: "Common labourers in husbandry which do loiter and be idle,
when they have reasonable wages offered them, shall be punished as vagabonds." On the earlier prosecution of vagabonds, see also 7 Rich. 2, c. 5 (1383).

88. The hours were from 5:00 a.m. to 7:00-8:00 p.m. with up to two-and-one-half hours for meals and rest from March to September, and "from the spring of the day in the morning until the night" from September to March. Absences were to be punished at the rate of one penny per hour. 5 Eliz., c. 4, § XII.

89. Many of whom were also MPs. See S. Bindoff, Tudor England 220 (1985 [1950]).

90. The justices were also empowered to rate "what wages every workman or labourer shall take by the great, for mowing, reaping or threshing of corn and grain, or for mowing or making of hay, or for ditching, paving, railing or hedging...and for any other kind of reasonable labours or service." Id. § XV(5).

91. Id. § XVIII.

92. Id. § XIX.

93. See Joyce Youings, Sixteenth Century England 298 (1986 [1984]).

94. An act for the explanation of the statute made in the fifth year of the late Queen Elizabeth's reign, concerning labourers, 2 [vulgo 1] Jac., c. 6, § II (1604).

95. Id. § III. The Act was continued by 3 Car. 1, c. 4 (5), §§ XXII-XXIII.

96. 5 Eliz., c. 4, § 15(2). This point does not appear to have been definitively settled until two years before the Statute was repealed. See R. v. Justices of Kent, 14 East 395, 104 Eng. Rep. 653 (K.B. 1811) (per Lord Ellenborough, C.J.) (with respect to application by journeymen millers to justices to rate their wages--because they had become inadequate in light of long hours and rising prices--justices had jurisdiction but court would not interfere with their discretion whether to use it).

97. 11 William Holdsworth, A History of English Law 467 (1938). As late as 1723 Parliament was still considering legislation that would have conferred upon the justices of the peace power to compel payment of wages to laborers and servants in husbandry. 20 Journal of the House of Commons 256 (Feb. 11, 1723).

99. Id. See also Snapse v. Dowse, Comb. 3, 90 Eng. Rep. 308 (1685) ("Only labourers are within the statute").

100. 11 William Holdsworth, A History of English Law 468 (1938).

101. See, e.g., R. v. London, 2 Salk. 442, 91 Eng. Rep. 384 (1702) (Statute does not apply to gentleman's servants or to journeymen with their masters), and 3 Salk. 261, 91 Eng. Rep. 814 (1702) (another report) (restricted to servants in husbandry because justices may compel men to work there and settle their wages); R. v. Corbett, 3 Salk. 261, 91 Eng. Rep. 814 (1702) (order for payment for labor and work done quashed because it did not set forth that payee was servant in husbandry to payor whereas labor and work might have been as carpenter or mason in building); R. v. Inhabitants of Hulcott, 6 T.R. 583, 587 101 Eng. Rep. (1796) (per Lord Kenyon, C.J.) (order discharging servant-pauper from service void because, under "the rigid rules of law," it did not on its face show that she was servant in husbandry).


104. Id. at 698-99.


106. Woodward, "Wage Rates and Living Standards in Pre-Industrial England" 91 Past & Present 28 (May 1981), makes the valid point that many building craftsmen in the sixteenth and seventeenth centuries were independent contractors rather than exclusively wage earners. He locates the origin of the confusion about their status in the fact that: "Unlike other craftsmen...building craftsmen rarely produced an easily valued final product.... Whereas the value of the labour of the shoemaker or tailor could be incorporated in the final price of his product, the labour of the building craftsman had to be valued by the day. Thus building craftsmen received a daily wage." Id. at 30-31. Nevertheless, Woodward fails to explain why these artisans were unable to assume risks qua entrepreneurs or what distinguished them from those who were admittedly wage-earning building trades workers. Woodward's view of the pre-industrial past may in part be skewed by his understanding of the structure of independent contracting in the present, which was shaped by his discussion with a plumber who
was paid by the hour but yet did not think of himself as self-employed. Id. at 28 n.*. Finally, given the fundamental divide separating dependent laborers and independent artisans, it seems inherently implausible that sixteenth-century contemporaries would have been "confused" (id. at 42) about the distinction—especially if all Woodward in reality meant was the distinction between masters and servants.

107. A "Memorandum on the Statute of Artificers" from ca. 1573 stated that smiths, carpenters, masons, weavers, bricklayers, wheelwrights, and others "seme to be...such occupacions as are most Laborsome and painefull, whereof some do not much differ from the trade of laborers." 1 Tudor Economic Documents 353, 357-58 (R. Tawney and E. Powers ed. 1924).


109. For the more brutal sixteenth-century legislation, see An act for the punishing of vagabonds, and for the relief of the poor and impotent persons, 1 Edw. 6, c. 3 (1547); An Acte for the setting of the Poore, and for the avoyding of Ydleness, 18 Eliz., c. 3 (1576).


111. The tens of thousands of poor law cases annually accounted for half of the business in the Quarter Sessions. 7 Sidney Webb and Beatrice Webb, English Local Government: English Poor Law History: Part I. The Old Poor Law 322 (1927).

112. 13 & 14 Car. 2, c. 12 (1662). The act was made perpetual by 12 Annae, c. 17, § [I] (1713)


114. 13 & 14 Car. 2, c. 12, § [I]. Although the Webbs characterized this preamble as a piece of "legislative mendacity," 7 Sidney Webb and Beatrice Webb, English Local Government: English Poor Law History: Part I. The Old Poor Law 325 (1927), one of the leading modern historians of seventeenth-century England has written that the statutory language is "an exact description of the lowest classes whom the Diggers had tried to mobilize to help themselves." Christopher Hill, The World Turned Upside Down: Radical Ideas During the English Revolution 282 (1973 [1972]).
115. 13 & 14 Car. 2, c. 12, § [I].
116. Id. § III.
118. An act for the better explanation and supplying the defects of the former laws, for the settlement of the poor, 3 & 4 W & M, c. 11, § 7 (1691).
119. 6 William Holdsworth, A History of English Law 352 (2d ed. 1971 [1924]).
120. An act for supplying some defects in the laws for the relief of the poor of this kingdom, 8 & 9 Will. 3, c. 30 (1697).
121. Id. § [I].
122. Id.
123. Id. § IV. On the subsequent treatment of the settlement and removal of unindentured apprentices, see 31 Geo. 2, c. 11, § [I] (1758).
125. Reportedly no poor person ever appealed a settlement-removal decision. 7 Sidney Webb and Beatrice Webb, English Local Government; English Poor Law History: Part I. The Old Poor Law 332 (1927). Parishes, on the other hand, often spent more on suits to block removal of the poor to them than it would have cost to support the removed. J.L. Hammond and Barbara Hammond, The Village Labourer 1760-1832, at 112-20 (1913 [1911]).
126. Burrow's Settlement Cases reports the cases for the period between 1732 and 1786.
127. See 2 Bott 315-541; 3 Richard Burn, The Justice of the Peace, and Parish Officer 479-576 (18th ed. 1797 [1755]).
128. Thus in R. v. Inhabitants of Over, 1 East 599, 102 Eng. Rep. 232 (1801), the King's Bench ruled that an East India Company pensioner's reserving to himself four days a year to go for his pension defeated a settlement because he was not under his master's control on those days. A settlement was also denied where it was an express exception rather than a usage of the trade that led to the inclusion of a provision
in a contract between a pauper and a bricklayer that
during bad weather in the winter the former could
employ himself otherwise. *R. v. Inhabitants of
Edmond*, 3 B. & Ald. 107, 106 Eng. Rep. 602 (1819). In
the light of such rulings it is difficult to attribute
any significance to Lord Mansfield's reminder that
"[t]he Court ought to lean in favor of settlements...."
*R. v. Inhabitants of Winchcomb*, 1 Dougl. 391, 393, 99

129. *R. v. Wrington*, Burr. 280 (1749). Dennison, J.,
acted that whereas the girl was a day laborer and not
a servant in the family, the law "plainly means a hired
servant who is part of the family...." *Id.* He also
expressed his fear of the consequences of extending
settlements "too far" in the clothesworking business,
which hired 100 children for a year who, however, might
serve for only a week. *Id.* In *R. v. Inhabitants of
Macclesfield*, Burr. 458 (1758), it was said of an
eight-year-old hired to work in a silk mill for three
years but whose service was "only" eleven hours per day
while "all the Rest of the Time, as well as on Sundays,
the said Pauper was at his own Liberty and his own
Master," that "[h]e was not in a continued and abiding
State of Servitude, during the whole Year." *Id.* at
458, 460.

130. *R. v. Inhabitants of Kingswinford*, 6 T.R. 219,

131. 11 William Holdsworth, A History of English Law
468 (1938) (referring to judicial rulings under similar
Statute of Artificers).

132. But see *R. v. Inhabitants of Birmingham*, 1 Dougl.
334, 99 Eng. Rep. 215 (1780), where it was held that
sufficient hiring and service obtained to gain a
settlement where a poor person was hired for a year to
make screws on a piece rate under the local usage that
if there was no work there would be no pay. Although
he absented himself, he did not work for others, and
the master did not think that he had the right to
compel him to return during such absences. Unfortunatley, the case was defectively reported (the
reporter stating that by the time the judge delivered
his opinion, "I had then left the Court"). *Id.* at 336.
But counsel in *R. v. Inhabitants of North Nibley*, 5
contradiction that Willes, J., had said in *R. v.
Birmingham* that, if the control-throughout-the-year
test "were to be understood in a general sense, a
handicrafts-man could never gain a settlement at all;
for that however general the hiring might be, he could
not be compelled to work on Sundays, or at unreasonable hours of the night."


134. R. v. Inhabitants of All Saints, Worcester, 1 B. & Ald. 322, 106 Eng. Rep. 118 (1818). To avoid confusion: the pauper had obviously not been one while earning £80 p.a. Presumably when he later fell on hard times in Worcester, the latter sought to have him removed to his alleged parish of last settlement—that of appellant Shoreditch. That parish, in turn, in order to avoid having to support the pauper, argued that he had never gained a settlement while living there and working as a clerk.

135. Id. at 324.

136. Id.


139. Id. at 900. In R. v. Inhabitants of Frome Selwood, 1 B. & Ad. 207, 109 Eng. Rep. 764 (1830), a worker agreed to work thirteen hours a day for a bedstead maker and not to work for anyone else. After repeating the rule that a settlement would be gained for being bound to work only the usual hours of the particular trade, Bayley, J., proceeded to hold that a master-servant relation did not subsist outside of the specific hours bargained for. Id. at 210. The court must have been operating on the assumption that the usual hours of a trade were never mentioned in an agreement: if hours were mentioned, they were exceptions from custom. Consistent with this interpretation are two colliery cases: R. v. Inhabitants of Byker, 2 B. & C. 114, 120-21, 107 Eng. Rep. (1823), and R. v. Inhabitants of Cowpen, 5 Ad. & E. 333, 339-40, 111 Eng. Rep. 1191 (1836).

140. The opportunity presented itself in R. v. Inhabitants of Pilkington, 5 Q.B. 662, 114 Eng. Rep. 1398 (1844), but the court did not seize it. Two cases of tangential interest may be mentioned. In R. v. Rickinghall Inferior, 7 East 373, 103 Eng. Rep. 144 (1806), a settlement was denied on the grounds that no master-servant relationship existed but that defect resulted from the fact that the parish officers had had
no authority to hire the pauper out. Control expressly played a part in the denial of a settlement to a farmworker who was at liberty to absent himself during the shearing season if he found a replacement at his own expense. *R. v. Inhabitants of Arlington*, 1 M. & S. 622, 105 Eng. Rep. 232 (1813).


142. *Id.* 1 B & Ald. at 325.

143. *Id.* at 327.


145. As Otto Kahn-Freund, following in the footsteps of Karl Renner, has stressed:

> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment."

Labour and the Law 6 (2d ed. 1977 [1972]). For Renner: "The employment relationship is...a public obligation to service, like the serfdom of feudal times. It differs from serfdom only in this respect, that it is based upon contract, not upon inheritance." Karl Renner, *The Institutions of Private Law and Their Social Functions* 115 (ed. Kahn-Freund 1949).

146. On the peculiar functions of civil law during that eighteenth-century transition, when "[t]he characteristic fissures...do not arise between employers and wage-labourers (as horizontal 'classes')" and the customary culture was--paradoxically--not subject in its daily operation to the rulers' ideological domination, see Thompson, "Eighteenth-Century English Society: Class Struggle Without Class?" 3 Social History 133, 145, 154 (1978).

147. Blackstone enumerated three sorts of servants: (1) *intra moenia* or domestic; (2) apprentices; and (3) laborers hired only by the day or week and not living as part of the master's family. Of this last category he stated that statutes had made many good regulations compelling work, defining hours, punishing unauthorized
departure, and setting and enforcing wages. 1 Bl. Com. *1, 426-27. The statutes Blackstone referred to were the Statutes of Labourers and Statute of Artificers and their amendments.


149. 1 Zephaniah Swift, A System of the Laws of the State of Connecticut 218 (1795). In the first years of the Republic it was still common to confine the term "servant" to indentured servants and "colored hirings": "In Pennsylvania none are called servants whose persons are not subjected to the coercion of the master, whether the business in which they are employed, be servile or not. No person to whom wages could be due for his services, would endure the name, as it would be considered offensive and a term of reproach." Boniface v. Scott, 3 Serg. & Rawl. 352, 354, 352 (Pa. C.P. Allegheny Cty. 1817) (interpreting 1794 intestate law conferring preference on wages of servants). See also Ex parte Meason v. Adm. of Ashman, 5 Binn. 167, 183 (1812) (interpreting same statute) (Brackenridge, J., dissenting): "Speaking of hired persons, we may call them servants; but not speaking to them, but at the risque of losing their service. I know of no description of persons, those bound by indenture to serve excepted, who would be willing to be called servants, unless members of assembly in a political meaning").


151. James Schouler, Treatise on the Law of Domestic Relations §454 (3d ed. 1881 [1870]), in fact sought to confine the master-servant relationship to times and places other than the contemporary United States.


153. For an overview, see C.R. Dobson, Masters and Journeymen: A Prehistory of Industrial Relations 1717-1800 (1980).
154. Such state-enforced discipline may have been necessary during a transition period in which incipient machine production was being organized by merchants integrating back into production rather than producers integrating forward into commerce. "The workmen are in general the operative mechanists; the masters in general are capitalists, who do not understand the principles upon which their machinery or tools are constructed.... A workman is, generally speaking, a man without capital...." Geo. White, A Digest of all The Laws at present in Existence respecting Masters and Work People 53 (1824). See also 11 William Holdsworth, A History of English Law 462-66 (1938). See generally, Paul Mantoux, La Revolution Industrielle au XVIIIe siecle (1959); Sidney Pollard, The Origins of Modern Management (1965). For a general discussion of the role of merchant capital during this formative period, see Peter Kriedte et al., Industrialisierung vor der Industrialisierung 194-232 (1977).

155. A good overview accompanied by an acidic commentary can be found in Geo. White, A Digest of all The Laws at present in Existence respecting Masters and Work People (1824).

156. 7 Geo. stat. 1 c. 13, §§ [I], II, VI (1720) (restricted to London and Westminster).

157. 9 Geo., c. 27, § IV (1722).

158. 12 Geo., c. 34, §§ II, VI (1725). This act also required clothiers to pay those they employed in money, imposing a £10 fine for violations. Id. §§ III-IV. This sum was raised to £20 by 29 Geo. 2, c. 33, § III (1756). The next year the act was amended to provide a 40s. forfeiture by clothiers for not paying wages within two days of performance. 30 Geo. 2, c. 12, § IV (1757).

159. 17 Geo. 3, c. 56, § VIII (1777).

160. An anonymous polemic, attributed to Defoe, asserted that, prior to the adoption of the aforementioned measures in the 1720s, an action brought by a master clothier against a journeyman weaver, that is, "a hir'd Covenant-Servant, bargain'd with for the year," for not finishing the piece of work he had been hired to weave did not lie before the justice of the peace, who could therefore not compel the worker to resume work. Although the master would have preferred the type of summary justice J.P.'s were authorized to mete out, he would have had to bring an action for breach of contract or trespass before the court of King's Bench or Common Pleas. Defoe viewed the alternative as academic because the worker was judgment proof and the poor clothier too poor to litigate.
[Daniel Defoe], *Great Law of Subordination Consider'd; or, the Insolence and Unsufferable Behaviour of Servants in England duly enquir'd into* 91-97 (1724).

161. 20 Geo. 2, c. 19 (1747).

162. By 31 Geo. 2, c. 11, § III (1758), the act was amended to apply to hiring in husbandry for less than one year.

163. 20 Geo. 2, c. 19, § [I] (1747).

164. Id. § II.

165. Id. Apprentices and masters were subject to similar procedures by reason of §§ III and IV. Appeal to the general quarter sessions was granted by § V; removal to the king's courts of record was prohibited by § VI.


167. An Act to enlarge the Powers of Justices in determining Complaints between Masters and Servants and between Masters, Apprentices, Artificers and others, 4 Geo. 4, c. 34, § III (1823).

168. An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen, 5 Geo. 4, c. 96, §§ [I]-III (1824); An Act to repeal the Laws relating to the Combination of Workmen, and to make other provisions in lieu thereof, 6 Geo. 4, c. 129, § II (1825).

169. An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen, 5 Geo. 4, c. 96, §§ [I]-III (1824).

170. For a sampling of the issues pertaining to contracts of service, see *Report from the Select Committee on Masters and Servants* Parl. Pap. 1865 (370) Vol. VIII.

171. An Act to amend the Statute Law as between Master and Servant, 30 & 31 Vict., c. 141, § 2 (1867).


173. 38 & 39 Vict., ch. 90, § 3 (1875).

174. Id. § 10.

175. Technically, the justice of the peace or magistrate often appeared as defendant on appeal.

176. It would be of antiquarian interest to discover how the worker-appellants in these cases secured counsel.
178. Id. at 117-18. The court did not join issue with the plaintiff regarding his claim that the Statute of Artificers, which was in pari materia with 20 Geo. 2, c. 19, had never been interpreted to apply to laborers in general. But in setting aside a conviction and commitment to the house of correction of a fourteen-year-old servant girl for leaving her master's employment over a wage dispute, the Court of Queen's Bench three decades later did cite the Statute of Artificers as authority for the exclusion of domestic servants. Kitchen v. Shaw, 9 Ad. & E. 729, 112 Eng. Rep. 280 (Q.B. 1837).
179. 8 East at 123, 125.
181. Id. at 539.
182. Id. at 540.
183. Id.
184. A categorical breach was partially effected by Ex parte Ormerod, 13 L.J.M.C. (N.S.) 73 (1844), holding that an artistic designer of calico patterns, who had been charged with unlawfully copying and embezzling patterns, was an "artificer" within the meaning of 4 Geo. 4, c. 34. Despite objections by the defense that a pattern designer receiving a very large salary was "not at all of the humble character of the persons enumerated," the court ruled that "artificer" was not defined by the requirement of "great manual labour. If it were so, then only those persons would be liable under it who are engaged in the most laborious processes." The designer's liability was made to hinge on his important role in cotton manufacturing, "the whole proceedings" of which he set in motion. 13 L.J.M.C. (N.S.) at 73, 74.
185. In a case, brought under the Employers and Workmen Act, 1875, where exclusivity was not contested, the defendant-worker articulated as the threshold issue whether he had contracted to perform personally and thus would be subject to imprisonment for failing to work. The worker in question was a potter printer the execution of whose trade required the aid of a so-called transferrer. When the transferrers went on strike over wages, the defendant continued to appear at work but could not perform owing to the absence of the transferrers. The magistrate ruled that the defendant should suffer the resulting loss because his contract with the transferrers provided for termination without notice while his contract with the employer provided for a month's notice. The Common Pleas Division
disposed of the case on the basis of the skill-cum-relative-nature-of-the-work test: "[I]t is hard to say that a man employed to do work manually, who employs another to do work which, if skilful and active enough, he could do himself, is not a 'workman' within the meaning of the Act." Grainger v. Aynsley, 6 C.P.D. 182, 188 (1880).


187. Id. at 611-12.

188. Id. at 604, 611.


191. Id. at 630-31 (holding that waller contracting to build road for certain sum between two dates who did not complete contract did not come within statute).

192. Ex parte Johnson, 7 Dowling 702, 705-7 (Q.B. 1839).

193. Id. at 705. In a factually similar case the next year, the Court of Exchequer did not even reach the issue of whether a master-servant relationship existed. It held defective the commitment of a journeyman calico printer for leaving his work unfinished on the grounds that it did not state that a contract had been entered into or work not done. Johnson v. Reid, 6 M. & W. 124, 151 Eng. Rep. 348 (Ex. 1840).


195. The existence of a compulsory notice period was deemed a surrogate for exclusivity. Taylor v. Carr, 31 L.J.M.C. (N.S.) 111 (1862) (upholding worker's back wage claim).

196. See, e.g., In re Bailey, 3 El. & Bl. 607, 118 Eng. Rep. 1269 (Q.B. 1854) (upholding two months' commitment to hard labor for ceasing to work as result of wage dispute at mine in violation of contractual one month's notice provision where workers worked on piece rate but could not cut coal for anyone else during life of contract); Ex parte Gordon, 25 L.J.M.C. (N.S.) 12 (1855) (piece-rate tailor working in master tailor's shop could refuse any work but could be discharged for working for others); Lawrence v. Todd, 14 C.B. (N.S.) 554, 138 Eng. Rep. 562 (1863) (skilled shipbuilding craftsmen contracting to execute all labor required to
complete hull by fixed date under control of employer exclusively in his service); Whiteley v. Armitage, 13 Week. Rep. 144 (Common Law Q.B. 1864) (stuff presser working exclusively for employer with latter's tools).


199. 21 Hen. 8, c. 7 (1530).

200. See, e.g., 9 Geo., c. 27, § [I] (1722) (hard labor for journeymen shoemakers purloining shoes, cut leather, etc.); 27 Geo. 2, c. 7, § [1] (1754) ("An act for the more effectual preventing of frauds and abuses committed by persons employed in the manufacture of clocks and watches" applied to any person "hired or employed by any person...practising the trade").


202. 17 Geo. 3, c. 56, § XV (1777) (An Act for amending and rendering more effectual the several Laws now in being, for the more effectual preventing of Frauds and Abuses by Persons Employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair and Silk Manufactures).

203. 6 & 7 Vict., c. 40 (1843).


205. 39 Geo. 3, c. 85 (1799) and 7 & 8 Geo. 4, c. 29, §47 (1827). On the lacuna-driven origins of the former, see 11 William Holdsworth, A History of English Law 533-34 (1938).


207. Id. at 371.


209. For a discussion of these cases, see infra ch. 4.


212. 24 & 25 Vict., c. 96, §§ 67-68 (1861).
213. See, e.g., R. v. Bowers, 35 L.J.M.C. (N.S.) 206, 208 (1866); R. v. Negus, 42 L.J.M.C. (N.S.) 43 (1873). For an inaccurate generalization from these latter cases, see Francis Batt, The Law of Master and Servant 629 (George Webber 5th ed. 1967 [1929]).

214. See, e.g., Commonwealth v. Young, 75 Mass. (9 Gray) 5 (1857) (independent shoemaker); People v. Burr, 41 How. Pr. 293 (Ct. Sess. 1871) (independent shoemaker); Gravatt v. State, 25 Ohio St. 162 (1874) (outside salesman). Although the New York court was somewhat ill at ease in acquitting the shoemaker—who sold the shoes he had made with leather he had received without payment from a shoe merchant—as a mere bailee, it suggested that employers could avoid this problem by entering into contracts "constituting the person employed but a mere employee." People v. Burr, 41 How. Pr. at 300.

215. Otto Kahn-Freund, Labour and the Law 23 (2d ed. 1977 [1972]). Chief among their common-law claims were assumpsit actions to recover wages. These arose—insofar as the issue of the nature of the employment relationship was concerned—in consequence of a putative middleman's absconding, remitting the worker to the deeper pocket for a remedy. The few reported cases largely turned on a not-well-articulated notion of privity. In a mining case that arose out of contracting arrangements to conduct certain operations, the outcome may have been disposed of by poor pleading on the part of the worker—who was not even represented on appeal—who did "not pretend to have been in the direct service of the company." Plymouth Coal Co. v. Kommisky, 9 Atl. 646, 647 (Pa. 1887). Although no promise to pay was ordinarily implied by the company, when the laborers' time was turned in, it was the company's usage to pay them and charge the amount to the miner's account. But the court held this not to be the primary liability, but only an implication from a general mode of doing business. If the company had adopted such a general rule, it would perhaps have been bound, but only if the time had actually been turned in before the miner had drawn on his account. Id. Haddock v. Rodkofski, 9 Atl. 652 (Pa. 1887), was a similar case decided on the authority of Plymouth Coal Co. v. Kommisky. See also Hill v. Lowden, 33 Ill. App. 196 (1889) (absent knowledge or custom to hire a second superintendent, defendant had no liability for wages of plaintiff hired by one with whom defendant had contracted to have a house built). Workers did not succeed in gaining judicial adoption of the categories of general and special employer from the vicarious liability and fellow-servant cases to wage-recovery
actions. Nor did the courts create the category of joint employment.


217. The action lay against the servant for breach of contract or against the inducer for trespass on case. See, e.g., 2 Zephaniah Swift, A System of the Laws of the State of Connecticut 66 (1796).

218. Perhaps the first important case not decided directly under the Statute of Labourers was Adams and Bafeald's Case. 1 Leo. 240 (K.B. Mich. 33 Eliz. (1591)).


220. Id. at 55-56.
221. Id. at 56. Aston, J., found the exclusivity of paramount importance even where a servant lived in his own house. A contrary ruling "might be of very bad consequence for trade. He is a servant quoad hoc...." Id.

222. The principle of the equal right of every employer to employ workers underlay the rulings that it was not actionable to induce a servant to leave his master's service at the expiration of his term even where the servant had had no intention of quitting. Nichol v. Martyn, 2 Esp. 732, 734 (Nisi Prius 1799); Boston Glass Manufactory v. Binney, 21 Mass. (4 Pick.) 425, 427-28 (1827); Walker v. Cronin, 107 Mass. 555, 563 (1871). But see Gunter v. Astor, 4 J.B. Moore 12 (C.P. 1819) (not overturning jury verdict in favor of plaintiff-employer whose servants were enticed away where defendant argued that he was justified because piece workers may depart when they have completed the work in hand).

223. See, e.g., Blake v. Lanyon, 6 T.R. 221, 101 Eng. Rep. 521 (1795) ("A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master..."). Holdsworth argued that this case showed that the idea behind the Statute of Labourers—viz., that the contract of employment gave the employed a special status—was disappearing in favor of the notion of a contractual relationship. 4 William Holdsworth, A History of English Law 384 (1924). Although true of Blake and Lumley, this argument overlooks the fact that these cases initiated this process at the cost of blurring the distinction between employees and independent contractors. According to the magisterial study by Richard Morris, Government and Labor in Early America 433 (1946), neither the colonial nor the revolutionary period witnessed any cases in which remedies for enticement were expanded beyond the breach of personal service contracts to include employment contracts in general as in Lumley v. Gye, where status in the true sense was not involved.


226. This argument the court rejected with the sort of deep-pocket reasoning never advanced by nineteenth century courts in favor of workers who were sued general employers when special employers were judgment proof.
"The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant...."

Id. at 230.

227. Id. at 219.

228. Id. at 227. In dictum Crompton, J., added that he was not to be taken as denying the tenability of an action not bottomed on the existence of a master-servant relationship at all.

229. Id. at 239-40.

230. Id. at 242.

231. Id. at 254.

232. Even Wightman, J., conceded that the Statute of Labourers applied only to "persons whose only means of living was by the labour of their hands." Id. at 241.

233. Id. at 266.


235. Marc Linder, European Labor Aristocracies, chs. 5 and 7 (1985).


237. In other words, injuria absque damno would have applied. If, on the other hand, the contract had provided for a date by which the worker had to have fully performed together with a penalty for late performance, presumably the enticement action would have been unnecessary.

238. Walker v. Cronin, 107 Mass. 555, 567 (1871), upheld this position with regard to outworkers of a shoe manufacturer.

239. I.e., at any one time an employee is generally employed by one employer whereas independent contractors work for many customers. But many employees have two jobs a day whereas at any one moment a non-employed self-employed plumber can repair the toilet of only one customer.